

In the Matter of Vikia Benton, Essex County
DOP Docket No. 2006-4621
(Merit System Board, decided August 9, 2006)

Vikia Benton, a County Correction Officer with Essex County, represented by Ciro A. Spina, III, Esq., petitions the Merit System Board (Board) for interim relief of her immediate suspension, effective December 16, 2005.

By way of background, on December 16, 2005, the petitioner was served with a Preliminary Notice of Disciplinary Action on charges of being absent for more than five consecutive days without notice; chronic or excessive absenteeism; inability to perform duties; neglect of duty; and conduct unbecoming a public employee. Specifically, the appointing authority asserted that the petitioner began employment with the Essex County Department of Corrections on June 6, 2005 and since her employment, she had called out sick a total of 30 days. Further, it claimed that the petitioner was absent from duty for six consecutive days without approval from her supervisor. The petitioner was immediately suspended effective December 16, 2005. Thereafter, the petitioner requested a departmental hearing. The appointing authority indicated that the petitioner was considered to be a provisional employee, and as such, she was not entitled to a hearing. The petitioner filed an appeal with the Board regarding her status and entitlement to a hearing. Her appeal was later rendered moot, as the appointing authority reconsidered the petitioner's employment status and afforded her a hearing. It is noted that Department of Personnel records indicate that the petitioner received a regular appointment as a County Correction Officer, effective August 11, 2005.

On April 6, 2006, the departmental hearing was held. The hearing officer found that the appointing authority sustained its burden of showing the petitioner's chronic and excessive absenteeism. However, it was determined that the petitioner's absences were for legitimate medical reasons. Nevertheless, given the petitioner's short length of service and the position that the petitioner held, the hearing officer recommended the petitioner's removal. A Final Notice of Disciplinary Action (FNDA) was issued on April 24, 2006, removing the petitioner from employment, effective December 16, 2005. It is noted that the petitioner filed an appeal of her removal with the Board. She was granted a hearing, and the matter is currently pending before the Office of Administrative Law.

In her request, the petitioner explains that she was on authorized sick leave due to a work-related injury and despite her request, the appointing authority failed to provide her with discovery and a timely hearing. As such, she requests back pay from December 16, 2005 to April 6, 2006, the period of time she was awaiting her departmental hearing. The petitioner further argues that the appointing authority failed to demonstrate the necessity for an immediate suspension, *i.e.*, how her

absences made her unfit for duty, a hazard to any person if allowed to remain on the job, or a threat to the safety, health, order, or effective direction of public services. *See N.J.A.C. 4A:2-2.5(a)1*. The petitioner claims that since she has been out of work for some time, she has had difficulty meeting her bills and expenses, which she argues will cause irreversible harm. On the other hand, the appointing authority would not be injured in paying her what she would otherwise be entitled to receive. Moreover, the petitioner argues that the public interest would best be served if the appointing authority followed proper procedures and afforded her a timely hearing. Therefore, she requests that she be awarded back pay, benefits, and seniority from December 16, 2005 to April 6, 2006.

In response, the appointing authority, represented by Steeve J. Augustin, Assistant County Counsel, maintains that there is not a clear likelihood that the petitioner will succeed in her request. It states that the petitioner violated numerous policies and procedures by failing to come to work. Further, the appointing authority argues that the petitioner's actions in such a short period of employment clearly are unbecoming and demonstrate her incompetence and inability to perform her duties. Moreover, the appointing authority asserts that the petitioner would not suffer irreparable harm, as she would be entitled to back pay if she is successful in her appeal. Regarding the petitioner's immediate suspension, the appointing authority states that during the first six months of her employment, she was absent from work for 30 days. As such, her immediate suspension was necessary to maintain a safe, effective, healthy, and orderly facility. Accordingly, the appointing authority contends that the petitioner's request for interim relief should be denied.

CONCLUSION

In reviewing this matter it is not necessary to address the merits of the charges against the petitioner. The sole issue to be determined is whether the nature and seriousness of the charges support the necessity for an immediate suspension. *N.J.S.A. 11A:2-13* and *N.J.A.C. 4A:2-2.5(a)1* provide that an employee may be suspended immediately without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services. A review the instant matter reveals that an immediate suspension was not justified.

The petitioner has essentially been charged merely for her absences, which she claims were due to medical reasons and her work-related injury. Under these circumstances, the Board does not find a valid basis to immediately suspend the petitioner. *See e.g., In the Matter of Kenneth Poole* (MSB, decided May 18, 2005) (Board found that the appellant's alleged misrepresentation of his medical condition in a Workers' Compensation proceeding did not constitute a sufficient basis for an

immediate suspension); *In the Matter of Alexis Ortiz* (MSB, decided March 9, 2005) (Board found that the appellant's persistence in ordering a City Councilman to comply with the City's anti-loitering ordinance did not constitute a sufficient basis for an immediate suspension); *In the Matter of Thomas Pappas* (MSB, decided December 15, 2004) (Board found that the appellant's alleged participation in physical activities while out of work and collecting Workers' Compensation benefits did not constitute a sufficient basis for an immediate suspension without pay, pending a departmental hearing). Accordingly, the petitioner's immediate suspension was inappropriate and she is entitled to back pay and benefits from December 16, 2005 until April 24, 2006. The Board notes, however, that the petitioner would only be entitled to back pay for the period she was able to work. See *In the Matter of Alphonso Hunt* (MSB, decided September 21, 2005); *In the Matter of Joseph Hornick* (MSB, decided January 29, 2003); *In the Matter of Carl Underwood* (MSB, decided July 10, 2001); *In the Matter of Charles Diehm* (MSB, decided October 14, 1998); *In the Matter of Andrew Ross* (MSB, decided January 2, 1996).

Moreover, the petitioner asserts that the appointing authority committed a procedural violation in not providing her with a timely departmental hearing. However, since the Board has already remedied the appointing authority's imposition of an improper immediate suspension with an award of back pay and benefits, no further remedies for this additional procedural violation are warranted.

Additionally, the petitioner is entitled to reasonable counsel fees pursuant to N.J.S.A. 11A:2-22, which provides that the Board may award reasonable counsel fees to an employee as provided by rule, and N.J.A.C. 4A:2-2.12, which provides that for disciplinary appeals, reasonable counsel fees are awarded where an employee has prevailed on all or substantially all of the primary issues in an appeal. While this matter is not specifically a disciplinary appeal, since the Board is not reviewing the merits of the charges or the penalty of removal at this time, it is clear that the effect of the petitioner's improperly imposed immediate suspension from duty was an involuntary separation from employment, which is the basis of all major disciplinary actions. Further, it is clear that the appointing authority misapplied the disciplinary rules in its treatment of the petitioner. Therefore, under these particular circumstances, the Board finds that this matter is substantially equivalent to an appeal of major disciplinary action and since the petitioner has prevailed on the primary issue of her petition, she is entitled to an award of reasonable counsel fees. See *In the Matter of Andrew Kullen* (MSB, decided September 26, 2000) (Back pay, benefits and counsel fees granted where the appointing authority did not have a sufficient basis for an immediate suspension). See also *In the Matter of James Campbell* (MSB, decided January 11, 2000); *In the Matter of Abnathy Mason* (MSB, decided July 7, 1999). However, it is noted that the petitioner is only entitled to counsel fees regarding her attorney's actions in respect to her petition to the Board and not to counsel fees that were incurred prior

to the petition. The Board also notes that the granting of back pay for this time period necessitates that the date of the petitioner's removal be changed to April 24, 2006, the date of issuance of the FNDA.

ORDER

Therefore, it is ordered that the petitioner be granted back pay, benefits and seniority from December 16, 2005 until April 24, 2006. The amount of back pay awarded is to be reduced to the extent of any income earned by the petitioner during this period. Proof of income earned shall be submitted to the appointing authority within 30 days of issuance of this decision. Additionally, the petitioner shall submit authorization that she was medically able to work during the period in question.

The petitioner is also entitled to reasonable counsel fees as described above. An affidavit in support of reasonable counsel fees shall be submitted to the appointing authority within 30 days of the issuance of this decision.

It is further ordered that the effective date of the petitioner's removal be changed to April 24, 2006.